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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS U.S.A,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court of Oregon

BRIEF OF AMICUS CURIAE CENTER FOR A JUST SOCIETY IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for a Just Society (CJS or the Center) advances and defends the Judeo-Christian principles of human dignity and social justice in law, policy and the public square. CJS works to improve the quality of life of the citizens of this Nation through research, education and advocacy. CJS brings attention and an alternative voice to issues of social justice.

The Center's approach to issues is shaped by a Judeo-Christian point of view that offers the greatest protections and the greatest freedoms for all members of our pluralistic society, not just people of faith. Under this point of view, human dignity is of equal importance to the unborn, the elderly, and individuals at all stages of life, and each individual is equal before the law regardless of societal status. This point of view holds individuals, businesses, and public institutions accountable for their actions.

A just society orders itself based on moral and ethical views of its people, and all laws invariably reflect a moral and ethical point of view. The case before this Court is an expression of a moral and ethical point of view. The people of the State of Oregon have spoken firmly regarding their views on the dignity of human life and the repugnance of corporate greed that seeks to deprive that dignity. CJS believes that Oregon's expression of its moral and ethical point of

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

view, placing human life and dignity over corporate greed and wrongdoing, is appropriate, and that this expression cannot be analyzed as a mathematical formula. CJS submits this brief in order to aid the Court and to express this moral and ethical view supporting the expression of the People of Oregon.

SUMMARY OF THE ARGUMENT

The issues in this case are very different from the Court's previous pronouncements on due-process limits to punitive damages. In this case, the loss at issue is a human life. The actions that caused that loss are typified by a corporate emphasis on profit at the expense of human life.

The corporate excesses that led to this death are not atypical. Cases around the nation regularly examine instances of corporate greed that result in the loss of life. A strong and powerful message should be sent, and is sent by the verdict in this case, that life is important, and the consequences of taking life to advance rapacious greed are weighty.

Punitive damages exist on a firm moral and legal foundation. That moral and legal foundation counsels that greater sums must be paid for greater harms, and that the more reprehensible the conduct, the greater the penalty should be. This Court has previously affirmed, in clear and cogent language, the importance of preventing the evil of wrongful death by way of tort law. It should do so again in this case.

The jury in this case expressed its community's standard for reasonable behavior, and also expressed in

strong terms the value it places on human life. The jury is the best entity in our system of government for setting this standard, consisting as it does of ordinary people from the community brought together at random to hear the evidence and make a determination. The jury is the essence of the judicial system, and this jury's pronouncement of its community standard should be respected and upheld.

The decision of the Oregon Supreme Court to uphold the verdict in this case was appropriate. The Oregon Court showed deference to human life and to the jury system. This Court should do likewise and affirm this case.

ARGUMENT

I. THIS CASE REPRESENTS FUNDAMENTAL CORPORATE EXCESS AT THE EXPENSE OF HUMAN LIFE.

This case is not about the quality of paint on a doctor's luxury automobile. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). It is not about the wrong visited on an individual when his insurance company fails to pay a claim. *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Rather, this case concerns the consequences that must be faced when corporate excess results in the loss of human life. Therefore, this case is, at its core, very different from this Court's previous precedents examining the propriety of punitive damages.

As this Court is fully aware, neither *Gore* nor *Campbell* concerned the loss of human life or personal injury. *Gore* addressed the appropriate level of punitive damages when a corporation misled consumers about whether the paint on a luxury automobile was original or not. *Campbell* addressed the appropriate level of punitive damages when an insurance company failed to pay a claim by an insured, and thus inflicted emotional distress on the insured.

This case is very different. The defendant, Philip Morris Incorporated, engaged in a decades-long campaign of deceit and trickery aimed at enticing smokers to continue to use its deadly products, all the

time aware that cigarettes cause serious health problems and death. *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2005). Indeed, as the Oregon Supreme Court's opinion below makes clear, Philip Morris and other tobacco companies initiated a campaign as early as 1954 that sought to undercut reports that tobacco use caused cancer, and to place doubt in the minds of consumers regarding negative reports. This campaign included phantom research efforts into the effects of tobacco that took place while manufacturers were working to manipulate the delivery of nicotine so as to achieve the maximum addictive effect.

Implicit in these facts is that Philip Morris and other tobacco manufacturers engaged in this scheme of deception for one simple reason: greed. Simply put, Philip Morris could not make money if smokers quit smoking. Reports that cigarettes caused serious health problems and death would lead to fewer people smoking. Thus, Philip Morris had to stem the tide and find a way to maintain sales. Its decision to do so placed its bottom line over the lives of those who used its products.

The result was predictable. Jesse Williams, according to this jury, accepted Philip Morris's campaign of deception and did not quit smoking. Eventually, lung cancer caused by cigarettes killed him. His death was the direct result of Philip Morris's conscious efforts to keep Jesse Williams and others smoking and using its products regardless of its knowledge that serious health problems and death could result.

Unfortunately, Philip Morris's actions are exemplary of an all-too-common theme. Certainly, most corporations in this nation are good corporate citizens, and nothing written here is meant to indict the whole of America's corporate community. However, many corporations today are driven by seemingly unrestrained excess. This excess, in greater frequency, is resulting in injury and death, often to the most vulnerable members of our society. An examination of just a few precedents from the states is useful to see this trend. Notably, each of these cases was decided after this Court decided *Campbell*, thus highlighting the currency of the problem.

Few would question that those residing in our institutions of long-term-care, otherwise known as nursing homes, are among the most vulnerable in our society. Unfortunately, these individuals are also among the most abused. Such abuse visited on 94-year-old Margaretha Sauer in Mena, Arkansas resulted in a large punitive-damages verdict against a nursing-home conglomerate in *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark 2003), cert. denied, 540 U.S. 1012 (2003).

The *Sauer* plaintiff's theory of liability was simple and similar to that advanced by the plaintiff in this case. The *Sauer* plaintiff asserted that the nursing-home conglomerate that owned the facility placed profit over quality care and caused injury to Mrs. Sauer including her death. This theory was supported by evidence of short staffing, altering medical records, "staffing up" during government inspections (called surveys) *Id.* at

354 and, perhaps most importantly, the testimony of a former vice president who described a "change in corporate philosophy in 1996 stressing profits over care." *Id.* at 352, 354.

Likewise, in *Miller v. Levering Regional Health Center*, ED 86933 (Mo. Ct. App. July 11, 2006), the Missouri Court of Appeals just recently upheld a punitive verdict against a residential facility where elderly, mentally ill Ocie Birkhead died due to the facility's failure to monitor her condition after she fell and hit her head. Central to the plaintiff's theory of recovery was the fact that the facility was understaffed. Staffing, in turn, is a major expense of such facilities. Lower staffing increases profits, but it also decreases care and causes death and serious injury. *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes – Report to Congress, Ch. 6.; Elder Abuse in Residential Long-Term Care Facilities: What is Known About Prevalence, Cause and Prevention: Testimony Before the U. S. Senate Committee on Finance,* Statement of Catherine Hawes, Ph.D. (June 18, 2002). Ocie Birkhead was left unattended until she had vomited on herself and suffered an irreparable hemorrhage that killed her. The Missouri Court of Appeals correctly referred to this conduct as reprehensible.

Cases of corporate excess leading to injury and death are not, however, limited to long-term-care specifically or medical care generally. For example, in *Forsythe v. Clark USA, Inc.*, 836 N.E.2d 850 (Ill. Ct. App. 2005), the Illinois Court of Appeals examined whether allegations of a corporate philosophy emphasizing

profits over employee safety stated a cause of action for direct liability against a parent corporation. In that case, two maintenance workers were killed when a fire erupted in a refinery while they were on their lunch breaks. Their estates sued the refinery's parent company alleging direct liability for the parent's "overall business strategy" that "focused on minimizing operating costs and limiting capital expenditures" at the cost of safety. *Id.* at 851. The Illinois Court held that a cause of action was stated.

The evidence relied on by the plaintiffs is telling. They pointed to a series of "cutbacks. . . that undermined safety, training, and maintenance. . . and. . . created an unreasonable risk of harm to others. . . ." *Id.* at 853. As part of an overall cutback in the budget and capital expenditures, the refinery had to "cut back its maintenance department staff and cancel its training program for new operators, causing both a deteriorization of the infrastructure at the refinery . . . and an overload of work on the undermanned crews." *Ibid.* These conditions, in turn, caused the explosion when untrained, unqualified crews tried to replace a valve. *Id.* at 851.

These cases are in no way meant to be exhaustive. They are merely examples of cases, like the one before this Court, where unbridled, rapacious corporate greed led to personal injury and death. [2] They are

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[2] Both before and after *Campbell*, state courts have emphasized that a conscious decision by a corporation to emphasize profit over safety justifies a substantial award of punitive damages. See, *e.g.*, *Union Pacific Railroad Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004) ("the

exceedingly relevant to the questions before this Court. According to Philip Morris and the *amici* supporting it, no award of punitive damages can exceed a certain mathematical limit and satisfy due process, no matter how egregious the conduct and no matter how devastating the injuries caused. They similarly argue that a jury cannot base its award on the widespread devastation caused by the practices at issue because to do so would punish Philip Morris for damage done to those not before the court.

These positions should not prevail. Each point ignores the importance of human dignity and opens the door for corporate excess unchecked, or inadequately checked, by moral and ethical standards of behavior.

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record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety."); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 384 (1981) ("There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety."); *Holmes v. Bridgestone/Firestone*, 891 So.2d 1188, 1191-92 (Fla. Ct. App. 2005) ("the proffer reflected facts from which it could be found that Firestone knew about the tread separation, but delayed warning the public in order to protect its own financial interests. Such a finding would support punitive damages"); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835-36 (Minn. 1988)(concluding that Goodyear's inadequate distribution of warnings about the danger of exploding rims, based on a corporate policy to restrict advertising dollars for projects that are not promoting product sales, was "willful indifference to the safety of others."); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (upholding a punitive damages award against a manufacturer who continued, for profit reasons, to supply flammable nightwear when nonflammable material was available).

The end result of such unchecked excess is more than twice-painted BMWs and unpaid insurance claims. It is the loss of human life.

The jury system serves as a check and balance on reckless conduct like that demonstrated by Philip Morris. The People of the State of Oregon have spoken regarding the importance of human life and dignity by way of the punitive-damage award in this case. The message they have delivered is that human life deserves the utmost respect, and that corporate excess that places profit over life cannot be tolerated in a civilized society. This statement of public policy delivered by perhaps the most representative of all arms of government itself deserves respect. Affirming the decision of the Oregon Courts affirms that respect, and it also affirms the basic moral and ethical message that human life is more important than corporate interests.

II. THE DIGNITY OF HUMAN LIFE SHOULD BE GIVEN THE UTMOST IMPORTANCE IN THIS CASE.

A reading of the briefs filed by Philip Morris and *amici* supporting its position reveals a desire to limit punitive damages to a predictable, business-planning range. Completely absent from this analysis is any discussion of the importance of human life and dignity or the moral basis for punitive damages. This oversight skews the question. This case should not be decided without thorough consideration of the human and moral element of the punitive-damages award made in

this case. Indeed, that element should be the overriding issue in the analysis.

Punitive damages clearly have a moral basis. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L.Rev. 705 (1989) (hereafter *Moral Foundations*). These moral foundations focus on retribution for the wrong done, and deterrence of future, like wrongs. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 568; *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991). See also Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L.Rev. 1257 (1976) (examining retribution and deterrence as justifications for punitive damages generally and in the products-liability context); Galligan, *Disaggregating More-Than-Whole Damages in Personal Injury Law; Deterrence and Punishment*, 71 Tenn. L.Rev. 117 (2003) (advocating a separation or disaggregation of the deterrence and retribution elements of punitive, or more-than-whole, damages) (hereafter *Disaggregating the Whole*). Both goals are morally, ethically and legally appropriate. *Moral Foundations* at 707 (noting that the legal legitimacy of punitive damages is dependent on their moral legitimacy. That moral legitimacy is grounded on ideals of freedom, utility, power, truth and trust).

These moral imperatives dictate that the amount of punitive damages, in the words of Judge Posner, "should be proportional to the wrongfulness of the defendant's actions." *Mathias v. Accor Economy Lodging*, 347 F.3d 672, 676 (7th Cir. 2003). A corollary of this idea is "that sanctions should be based on the wrong done rather than on the status of the defendant," a notion

Judge Posner describes as "the core of the Aristotelian notion of corrective justice." *Ibid.* This guidance as to "amount" is further informed by the notion that the "award of punitive damages" in a particular case can serve "the additional purpose of limiting a defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Id.* at 677. See also *Disaggregating the Whole* at 132-146 (examining the reasons why punitive conduct will be under prosecuted and under deterred if only the actions and individuals before the court in a particular case inform the punitive verdict). Judge Posner, it seems, speaks directly to the excesses caused by an unrelenting, unchecked pursuit of profit at the expense of human life described in this brief, and to the notion that such actions merit increased punitive awards.

These ideas of increased punitive-damages awards for greater harms, more reprehensible actions, and repeated yet possibly unprosecuted behavior fit neatly within this Court's recent precedents describing the due-process limits on such awards. In both *Gore* and *Campbell*, this Court counseled that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 574). This "reprehensibility" analysis, in turn, focuses on the very issues described above that form the moral basis for punitive damages: the type of harm caused, whether the tortious actions were exemplified by a disregard for the health and

safety of others, the vulnerability of the victim, the repetition of the tortious actions, and whether those actions evidenced "malice, trickery or deceit." *Ibid* (citing *Gore*, 517 U.S. at 576-77).

In a case like the one before this Court, these moral and legal issues should rightly dominate the debate. Again, this case does not focus on mere economic loss. Indeed, the pure economic loss determined by the jury was minimal, only $21,485.80. Rather, the focus in this case is repeated, deceptive, calculated conduct that caused the death of Jesse Williams. This loss cannot be reduced to a neat mathematical formula, reduced to present value, that "compensates" the victims and rights the wrongs.

The value of human life has guided this Court in the past where even benign corporate interests have sought to avoid liability by shielding themselves behind a beneficial interpretation of the due-process clause. Seventy-nine years ago, this Court passed on a corporation's due-process challenge to Alabama's wrongful-death statute that imposed *respondeat superior* liability on an employer whose employee caused a negligent death. Writing for the Court, Mr. Justice Stone held:

> As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a

> position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only on those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

Pizitz Co. v. Yeldell, 214 U.S. 112, 116 (1927) (citing *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281 (1908); *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916); *Wilmington Mining Co. v. Fulton*, 205 U.S. 60 (1907)).

This Court did not shy away from the moral mandate before it in 1927, and it should not do so now. The corporate interests at stake in this case are anything but benign. The value and dignity of human life, and the efficacy of the tort system in protecting it, hang in the balance. Philip Morris seeks a system where its wrongs can never be punished more than a definitive multiplier above the damage it causes to a single victim regardless of the number of times the harm is caused and regardless of the reprehensibility of the conduct. This approach would ignore the states' interest in attempting "to preserve human life by making homicide expensive."

The Supreme Court of Oregon was right. Philip Morris's conduct was reprehensible in every respect. The result of that conduct was as damaging as damage can be, the death of a human being. Moreover, it does not stretch credibility to write that the "evil" was much more than "the negligent destruction of human life." Malicious and reckless, at minimum, are much more apt terms. The Oregon Court should be affirmed.

III. THE COMMUNITY STANDARD ANNOUNCED BY THE JURY SHOULD BE UPHELD.

The jury spoke clearly in this case. That voice should be heard and affirmed. The importance of trial by a jury in this nation is well established. When the Founders listed their grievances against "the present King of Great Britain" in the Declaration of Independence, they included among them "depriving us in many cases, of the benefit of Trial by Jury." The Bill of Rights and state constitutions, of course, expressly include the right to trial by jury. Juries are so important in this nation that criminals do not go to prison if juries so determine.

With respect to awards of punitive damages, early decisions "show both a respect for the jury's discretion and a hesitancy to interfere with its judgment." Borowsky and Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L.Rev. 147, 152 (1983) (hereafter *The Integrity of Jury Verdicts*)(citing *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763)). Juries, such as this jury, are

made up of local citizens, and their composition is not known until the trial begins. Neither side pays juries, and the evidence they hear must meet a threshold of reliability. Neither side can approach a jury outside the presence of the other. Thus, the system under which the jury makes its decision is perhaps the most fair of any yet devised.

Historically, courts and legislatures have respected this community voice and deferred to juries' pronouncements on punitive damages, and with good reason:

> An examination of judicial opinions and statutory law reveals that the jury's power to award punitive damages proceeds from its ability to speak for the community. As a group, the jury is in the best possible position to function as the community's conscience. A jury's reactions of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of an award, it measures society's outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

The Integrity of Jury Verdicts, at 152-53 (citing *Orkin Exterminating Co. of So. Fla. v. Truly Nolen, Inc.*, 117 So.2d 419, 423 (Fla. 1960)).

Jurors function as part of the judicial branch. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (Taft, C.J., for the Court). As Chief Justice Taft noted,"[t]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse." *Ibid.* The corollary, of course, is also true. Through the jury system, people at the local level decide what is reasonable and acceptable in their own communities. This approach is especially appropriate in the tort system where the entire question is what is reasonable under the circumstances.

This Oregon jury decided what is reasonable in Oregon. It clearly mandated that a scheme whereby users of a dangerous product were duped into believing that reports about its danger were false or exaggerated, when the purveyors of the scheme knew otherwise, will not be tolerated. That common-sense determination deserves great deference where, as here, human life hangs in the balance. The Oregon Court's decision to uphold that verdict should be affirmed.

CONCLUSION

The decision of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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